Raley's Supermarkets and Drug Centers *and* United Food & Commercial Workers Union, Local 839.[1] Case 32–CA–20049–1

January 19, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

On October 27, 2003, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order. For the reasons set out by the judge, and as further explained below, we agree that the Respondent did not unlawfully fail to respond to requests for information from the Union in violation of Section 8(a)(5) and (1) of the Act.

I. FACTUAL BACKGROUND

The material facts are not in dispute. As recounted in greater detail in the judge's decision, this dispute arose from two grievances the Union filed in May 2002 on behalf of unit employees Peggy Taylor and Yolanda Huerta, respectively. The grievances alleged that each employee had been harassed, discriminated and retaliated against, and arbitrarily transferred to another Raley's store by local management while they were employed at the Respondent's Nob Hill store in Monterey, California.[2] Each grievance sought a transfer back to the Monterey store or to a store closer to the grievant's home, reimbursement for additional travel costs incurred by the grievant, and an "immediate" stop to the alleged misconduct.

The Respondent's senior human resources manager, Chris Clark, acknowledged receipt of the grievances in writing, indicating that a "thorough investigation" of each would be conducted. Clark and other human resources managers met with the grievants on May 21, 2002,[3] and subsequently with the accused supervisors and employee witnesses whom Taylor and Huerta had identified. Although not referenced by the judge, Union Secretary-Treasurer Debbie Willis sent a followup letter to the Respondent on June 24, attaching a "summary of information brought to my attention after [the grievants'] meeting with you on 5/21/02." Based on that information, the Respondent further investigated the grievances.

On July 18, in a letter to Willis, Clark reported that the Respondent had completed its investigation of both grievances, and concluded that "[b]ased on our investigation we feel that we have taken the appropriate action and therefore, the Company considers this matter closed." There is no evidence that the Respondent prepared a formal report of its investigation.

In response to Clark's letter, on July 23 the Union's attorney requested that a board of adjustment be convened on the grievances. Thereafter, on July 26, Willis made the first of two information requests. In her July 26 request, Willis sought a clarification of what matter the Respondent considered closed and asked what "action or corrective measures" it had taken. Willis asked that grievants Taylor and Huerta be informed of the "investigation results," and requested "a copy of all reports made by the company pertaining to the investigation." Willis also indicated that the grievances had not been resolved and that the Union intended to pursue them.

During this same period, correspondence was exchanged between the Union's counsel, Matthew Ross, and the Respondent's director of labor relations, David Cuesta. On June 23, Ross wrote Cuesta to protest Clark's refusal to let Willis participate during the investigatory interviews of the grievants, other than in the capacity of an observer. On July 29, Cuesta wrote Ross, defending Clark's actions. In the same letter, Cuesta revealed general information as to the content of the Respondent's investigations of the grievances and stated, in pertinent part, that "[n]ot one of the employees interviewed by Mr. Clark has made any allegations of being treated rudely, disrespectfully or unprofessionally in any way. It is our task to make every effort to assure our employees work in a harassment-free environment. Otherwise, we believe the situation has been addressed and the matter closed."

On August 21, Ross wrote a response to Cuesta's July 29 letter, seeking additional information.[4] The letter requested, in pertinent part, "a copy of the investigator's report on the specific allegations of inappropriate behavior," and insisted, "[a]t a minimum[,] . . . that the Company summarize the pertinent findings as to specific allegations."

At some point in August, when Cuesta and Willis met for the "board of adjustment" phase of Huerta's grievance, Cuesta asserted that the grievance had been re-

[1] We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers Union from the AFL–CIO, effective July 29, 2005.

[2] The grievance on behalf of Huerta also included a broader statement that "Mrs. Huerta told you that she believed that the women in the store are treated different than the men."

[3] All subsequent dates are in 2002.

[4] The July 26 and August 21 information requests comprise the information alleged in the complaint.

solved and, accordingly, that the Respondent was not required to provide additional information on the matter.[5]

Unfair labor practice charges were filed in this case on October 2. In December, the Respondent's counsel informed the Regional Director that it had no written investigative reports or witness statements pertaining to the grievances in its possession. On January 29, 2003, the Respondent's counsel provided the Union with a letter it had prepared during the investigation of the unfair labor practice charges, summarizing information that it had obtained during its investigation of the grievances. This summary was consistent with Cuesta's July 29 statement to Ross that "[n]ot one of the employees interviewed by Mr. Clark has made any allegations [of improper treatment]."

In recommending dismissal of the complaint, the judge stated the principle that although, in internal investigations such as the one involved in this case, an employer is required to disclose the names of witnesses it interviewed, the employer is not obligated to furnish either witness statements or summaries of those statements. The judge found that the Respondent provided the Union with the list of most of the individuals it interviewed, and, in its July 26 and August 11 information requests, the Union did not seek the names of witnesses that the Respondent interviewed.

Applying the above-stated principle, the judge found that the Respondent was not required to provide the Union with witness statements, if such statements existed, or to furnish it with summaries of witness statements or "the opinions, comments or recommendations of the managers who conducted the investigations." The judge additionally found that information as to any training, reassignment, or disciplinary actions the Respondent might have taken regarding the accused supervisors would not establish evidence of wrongdoing. Finally, the judge found that, in the context of this case, the Union's requests for information amounted to "pretrial discovery," to which the Union was not entitled under Board precedent. See, e.g., *California Nurses Assn. (Alta Bates Medical Center),* 326 NLRB 1362 (1998). He accordingly found no violation of Section 8(a)(5) and (1). For the reasons that follow, we affirm.

II. ANALYSIS

A union is entitled to the information in the employer's possession that it needs in order to carry out its representational duties to the bargaining unit. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). The standard for determining the relevance of information requested by a union is a broad, "discovery-type" standard. Id. at 437 fn. 6. An employer is required to furnish grievance-related information to the union so that the union can determine whether to pursue the grievance to arbitration. Id. at 437. To make this determination, the union must assess not only the merits of the grievance but also the adequacy of any remedial action the employer has taken. E.g., *Postal Service,* 276 NLRB 1282, 1286 (1985).

In our view, in the circumstances of this case, the Respondent provided a sufficient response to the Union's request for information concerning the grievances of the unit employees. Our dissenting colleague suggests that the Respondent did not tell the Union of the results of the Respondent's investigation of the grievances. The truth is that the Respondent did tell the Union of the result. Following the Union's first information request, the Respondent informed the Union that "[n]ot one of the employees" it had interviewed had complained of improper treatment. The Respondent therefore told the Union that "this matter [was] closed." Reading these statements together, it is apparent that the Respondent was saying that it had found no merit to the grievances. Moreover, it was clear not only from these statements, but also from the conspicuous absence of any remedial action by the Respondent affecting the grievants, that the Respondent found the grievances to lack merit.

Although the Respondent also said that it had "taken the appropriate action," the phrase, in the above context, could not possibly be understood to mean that remedial action had been taken. The fact is that the Respondent found no merit to the grievances, the "action" was to deny the grievances on their merits, and the Union reasonably could not have understood otherwise.

Nor does the record disclose the existence of any other information that the Respondent possessed that would have been of real use to the Union. The Union had provided the Respondent with the names of witnesses to the alleged misconduct (whom the Respondent interviewed), and the record evidence does not conflict with the Respondent's claims that its interviews with these witnesses failed to substantiate the alleged harassment. Further, even were the Union entitled to witness statements prepared by the Respondent (which it was not), the Respondent testified without contradiction that it prepared no such statements or investigatory reports.

Finally, to the extent that the dissent argues that the Respondent violated the Act by failing to timely inform the Union that it had no reports, we disagree. The complaint specifically alleged that, since about August 21, 2002, the Respondent unlawfully failed and refused to provide the Union with "a copy of the investigator's report on the specific allegations of inappropriate behavior." At no time, even after learning that such a report did not exist, did the General Counsel amend the complaint to allege that the Respondent violated the Act by failing to timely inform the Union that there were no such reports. Accordingly, we would not find a violation on that basis.

[5] A second basis stated by Cuesta for refusing to provide additional information was that Huerta had filed overlapping charges with a State agency, and that that matter was still pending. However, the Respondent does not rely on that rationale before the Board.

Our colleague would construe the complaint to allege precisely the opposite of what it does allege. As noted above, the complaint alleges that the Respondent failed to furnish a document, viz., a copy of the investigator's report. The complaint therefore implicitly alleges that the report exists and that the Respondent refuses to furnish it. Further, we assume arguendo that the allegation can be broadly construed to cover an untimely furnishing of the report or an incomplete furnishing of the report. However, it is an unreasonable stretch to convert this allegation into its opposite, i.e., that the report does *not* exist, and that the Respondent failed to inform the Union of this fact. If the General Counsel wanted to allege this as an alternative pleading, he could have done so. He did not. We therefore decline to find a violation on this basis.

In sum, in response to the Union's requests for information, the Respondent timely provided the Union with information from which the latter reasonably would understand that the Respondent: found no merit to the grievances, would take no further action, and considered the matter closed. That was all of the relevant information in the Respondent's possession, and it provided it to the Union. In these circumstances, we conclude that the judge's conclusion that there was no violation of Section 8(a)(5) and (1) was correct.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. January 19, 2007

Robert J. Battista, Chairman

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

The importance to the Act of exchanging information that concerns the processing of grievances has often been underscored. See, e.g., *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 439 (1967) (Board's order that employer furnish requested information to union "consistent both with the express terms of the Labor Act and with the national labor policy favoring arbitration"). For a union to make an informed decision about taking a grievance to arbitration, it must know what action the employer has taken with respect to the grievance and why. If employers were not obligated to provide this essential information, unions would have no real option but to pursue every grievance—which would effectively shut down the grievance-arbitration process. Id. The majority here invites that result by finding that the Respondent Employer did *not* violate Section 8(a)(5) and (1) when it refused to inform the Union of the results of its investigation of the Union's grievances and the action it took with respect to those grievances. I dissent, as I have in other recent cases that seem to reflect a watering down of employers' obligations in this area.[1]

I.

The Union filed grievances on behalf of two employees, alleging mistreatment by supervisors. The employer, Respondent Raley's Supermarkets and Drug Centers, replied that it would investigate the allegations and "respond to you regarding our findings and the outcome." Raley's managers interviewed the grievants, several employee witnesses identified by the grievants, and the accused supervisors. It then summarily advised the Union that "[b]ased on our investigation we feel that we have taken the appropriate action and therefore, the Company considers this matter closed."

Not surprisingly, the Union sought more information. A union official asked Raley's whether it had found that the supervisors had acted inappropriately and what "action or corrective measures" had been taken to address the grievants' concerns. She also sought a "copy of all reports made by the company pertaining to the investigation." Raley's never responded directly to this request. Instead, its director of labor relations wrote to the Union's attorney, stating that no employees who were interviewed had alleged that *they* had been mistreated. He again dismissively concluded that "the situation has been addressed and the matter closed."

The Union's attorney followed up by asking Raley's to provide a "copy of the investigator's report" or, at a minimum, to "summarize the pertinent findings as to specific allegations." There was no response to this request either. At about the same time, Raley's also refused to discuss the investigation at the parties' initial meeting on one of the grievances.

Four months later—and after the Union had filed its unfair labor practice charge—Raley's informed the Board's Regional Office that it had no written investigative reports or witness statements. Even then, however, Raley's did not share this information with the Union. More than a month after that, and 5 months after the Union's attorney had sent his second letter requesting information, Raley's provided the Union with a written summary of some of the information it had obtained during its investigation months earlier.[2] The Union has not yet decided whether to take the underlying grievances to arbitration.[3]

[1] See *Northern Indiana Public Service Co.*, 347 NLRB No. 17, slip op. at 6 (2006) (dissent) (collecting cases).

[2] At the hearing in this case, the Union witness testified without contradiction that even this summary failed to address "probably 90 percent" of the allegations made by the grievants in their interviews with Raley's managers.

[3] Other grievances on behalf of the two employees involved here are also on hold.

II.

"The union should not be required to grope blindly through the grievance procedure for want of relevant information within the possession of the respondent." *Vertol Division,* 182 NLRB 421, 426 (1970). That, however, is exactly what happened here. Raley's—while telling the Union that it had "taken the appropriate action" and "consider[ed] this matter closed"—revealed nothing of its investigation, its fact findings, its conclusions, or its purported "action." It provided no documents and no information concerning its investigation or its results until well after the Union had filed its unfair labor practice charge.

In the majority's view, it should have been clear to the Union from Raley's initial statement that "we have taken the appropriate action and . . . the Company considers this matter closed," and from the "conspicuous absence of any remedial action," that Raley's "was saying" that the grievances had no merit. Even if this were true, however, the Union would still have been entitled to know, at a minimum, what "action" Raley's had taken, whether investigative reports existed and, if so, the contents of those reports.[4]

However, in view of Raley's initial cryptic reference to the "appropriate action" it had taken, it was not at all clear at the time that the company had denied the grievances. Nor did it suffice for Raley's to tell the Union that no employees *other* than the grievants had made similar complaints, since the primary issue was the mistreatment of the grievants themselves. Raley's' disingenuous response noticeably failed to state that the grievants' own allegations were meritless.

Nor, contrary to the majority's view, was the Union required to wait for Raley's' position to reveal itself over time through an "absence of remedial action."[5] Indeed, it is Raley's' entire course of conduct—which can fairly be described as stonewalling—that clearly violates Section 8(a)(5). An employer is required to respond to union requests for relevant information "as promptly as possible." E.g., *Woodland Clinic,* 331 NLRB 735, 736 fn. 5 (2000); *Samaritan Medical Center,* 319 NLRB 392, 398 (1995).

The majority also misses the point in finding Raley's' ongoing silence to be excused by the purported nonexistence of "any other information that the Respondent possessed that would have been of use to the Union," including written investigative reports. Assuming that no other useful information existed and that no written reports were ever created, the Union had a right to know this and Raley's could simply have told it so. Instead, the company deliberately withheld even this elementary information for months. The Union had a right to know what Raley's knew with respect to the requested information (except what was privileged) at the time of the request, absent a showing (not made here) that providing that information would be burdensome. *Acme Industrial,* supra, 385 U.S. at 437–438.

In the majority's view, Raley's failure timely to inform the Union that no investigative reports existed was outside the scope of the complaint. But the majority notes, as it must, that the complaint (which was dated December 31, 2002) alleged that "since on or about August 21, 2002, the Respondent has unlawfully failed and refused to provide the union with [the requested] copy of the investigator's report on the specific allegations of inappropriate behavior."[6] This allegation, made more than 4 months after the Union's unsatisfied request for information, clearly encompassed both the failure to provide information and the failure to provide information on a timely basis. In addition, since "[t]he duty to bargain encompasses not only the duty to furnish relevant information, but also the duty to furnish such information in a timely manner,"[7] a failure timely to respond amounts to a failure to furnish.[8] The Board has not required separate complaint allegations to cover both variants of this misconduct.[9]

Moreover, the notion that an employer's failure timely to indicate that it lacks requested information is somehow distinguishable from a failure to provide available information does a disservice to the Act. The purpose of the Act's requirement that parties provide each other with relevant information is to maximize *communication* between them and so minimize industrial strife. For this purpose, it is elementary that parties must not only provide requested information, but also timely inform each

[4] Contrary to the majority's view, a union has a general right of access to investigation reports and files prepared for the employer concerning incidents involving bargaining-unit members, subject to properly-raised and supported confidentiality claims. Even where the employer raises a claim of confidentiality, it has a duty to seek an accommodation. See, e.g., *Postal Service,* 332 NLRB 635, 636 (2000); *New Jersey Bell Telephone*, 300 NLRB 42, 43 (1990), enfd. 936 F.2d 144 (3d Cir. 1991); *United Technologies,* 277 NLRB 584, 587–589 (1985). Raley's, however, never asserted a confidentiality claim in response to the Union's information requests.

[5] Nor was Raley's failure to take remedial action ever "conspicuous" to the Union, since such action might have included unpublicized disciplinary or administrative steps taken with respect to the accused supervisors.

[6] The complaint also alleged an unlawful failure to provide "a copy of all reports made by the company pertaining to the investigation" since the Union's earlier request for that material.

[7] *U.S. Information Services,* 341 NLRB 988, 992 (2004).

[8] "There is no point in requiring a party to furnish information if it can delay its production so that its utility will be diminished or lost." Id.

[9] See *Care Manor of Farmington,* 318 NLRB 330 (1995) (where complaint alleged that employer, since date of union's request, "has failed and refused to furnish . . . the information requested," employer acted unlawfully "[b]y its delay in providing some of the information and its refusal to provide the rest"); *Gloversville Embossing,* 314 NLRB 1258 (1994) (contrary to judge, Board found violations not only by failing timely to provide information but also by failing to provide it in a complete manner, even though complaint alleged only the former).

other when they have none to provide. The failure to do either is obviously a violation of the duty to provide relevant information.

III.

If Raley's decided, based on its investigation, that the accused supervisors had not engaged in improper conduct and that it would take no remedial action, it could simply have said as much to the Union. Instead, it obfuscated about what it had learned from its investigation, what action it had taken as a result, and why. The duty to bargain in good faith demands more from an employer, so that a union can make an informed decision with respect to grievance-processing. Forcing the union to play protracted guessing games can only damage the parties' collective-bargaining relationship, and this flies in the face of the Act's purpose. Accordingly, I dissent.

Dated, Washington, D.C. January 19, 2007

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

Virginia Jordan, for the General Counsel.
Patrick W. Jordan, of San Rafael, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Salinas, California, on August 5, 2003. On October 2, 2002, United Food and Commercial Workers Union, Local 839, AFL–CIO (the Union) filed the charge alleging that Raley's (Respondent or the Employer) committed certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). On December 31, 2002, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent alleging that Respondent violated Section 8(a)(1) and (5) of the Act. Respondent filed timely answers to the complaint denying all wrongdoing.

The essential issue is whether Respondent failed and refused to provide the Union with information relevant to the Union's processing of certain contractual grievances and necessary for the proper performance of its representative duties in violation of Section 8(a)(1) and (5) of the Act.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses[1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent, a California corporation, with offices and places of business in various locations in the State of California, has been engaged in operating retail grocery stores. During the 12 months preceding issuance of the complaint, Respondent received gross revenues in excess of $500,000 and purchased and received at its California locations goods valued in excess of $50,000 directly from suppliers located outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts and Issues

Respondent is engaged in the business of operating grocery supermarkets and drug centers. Among its retail grocery operations are 26 Nob Hill Foods stores, including a store number 612, located in Monterey, California. The Union represents employees at approximately 8 of the 26 Nob Hill stores. The Union and Respondent have been engaged in a long-term collective-bargaining relationship. The parties' collective-bargaining agreement consists of two agreements which must be read together—the 1997–2001 collective-bargaining agreement and the September 2002 memorandum of agreement extending the 1997–2001 agreement until September 2004.

On May 2, 2002, the Union filed a grievance on behalf of employee Peggy Taylor alleging that Respondent's managers had harassed and discriminated against Taylor. In addition to the cessation of the alleged harassment and discrimination, the Union sought a transfer for Taylor and reimbursement for travel expenses.

On May 3, 2002, the Union filed a grievance on behalf of employee Yolanda Huerta, alleging that Respondent had harassed and discriminated against Huerta. In addition to the end of the alleged harassment and discrimination, the Union sought a transfer for Huerta and reimbursement of travel expenses.

Respondent acknowledged receipt of these grievances stating:

> The Company appreciates you bringing these concerns to our attention, as we are committed to providing a workplace free from harassment and discrimination. The Company takes these types of concerns seriously and will be conducting a thorough investigation of [both employees'] allegations. . . . Once we have conducted our investigation, we will be responding to you regarding our findings and the outcome.

On May 21, Chris Clark, a senior human resource manager, and Human Resource Manager JoAnn Pingree met with Huerta and Taylor to investigate the allegations against Respondent's supervisors. Following these meetings, Clark and Pingree met with certain employees named by Taylor and Huerta as having relevant information regarding the allegations against Respondent's supervisors. In addition Pingree and Clark met with the supervisors against whom the allegations were made. According to Respondent's attorney, Taylor and Pingree interviewed approximately 20 employees and managers.

[1] The credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

On July 18, Clark wrote Debbie Willis, the Union's secretary/treasurer, stating that the investigation had been completed. In pertinent part, the letter stated, "recently, the Company completed a thorough investigation regarding the allegations brought forth by Ms. Huerta and Ms. Taylor. Based on our investigation we feel that we have taken the appropriate action and therefore, the Company considers this matter closed.''

On July 26, Willis wrote Clark a letter requesting information, which is one basis of the instant complaint:

> The Union is in receipt of your letter dated July 18, 2002 regarding the investigation into the complaints lodged by Huerta & Taylor. We are confused by its content and ask that you clarify the statement that the company considers the matter closed.
>
> 1. What matter is considered closed?
>
> 2. Is your letter a response to the grievance filed on behalf of Huerta and Taylor or your Human Resource investigation?
>
> 3. Have Ms. Huerta and Ms. Taylor been informed of your investigation result?
>
> 4. What action or corrective measures was taken by the company to address their concerns
>
> It is the Union's position that Ms. Huerta and Ms. Taylor should be fully informed of the investigation results. Did the assistant store manager and others act inappropriately and if so, what corrective action was taken. These ladies cooperated fully with the company and deserve a response.
>
> Further, we do not consider the grievance the Union filed on their behalf resolved. These grievances are still alive and we are requesting a board of adjustment as outlined in Section 18 of the collective bargaining agreement. We are also requesting a copy of all reports made by company pertaining to the investigation.

Respondent did not reply to Willis' July 26 letter. Thus, on August 21, the Union's attorney wrote Respondent's director of labor relations. The letter made the following request for information, which also forms a basis of the complaint: "[t]he Local requests a copy of the investigator's report on the specific allegations of inappropriate behavior. Were they sustained or rejected and why? . . . We insist that the Company summarize the pertinent findings as to specific allegations."

In August, Willis met with Respondent's director of labor relations at a board of adjustment regarding Huerta's grievance. Respondent took the position that Huerta's grievance had been resolved and that therefore, Respondent was not obligated to furnish information regarding its investigation. Respondent took the position that a charge had been filed with a State agency and, therefore, Respondent would not prejudice its defense by furnishing any further information.

Respondent asserts in its brief that during the investigation of the instant case in December 2002 its attorney notified the Regional Director that no written investigative reports or written witness statements existed. In an attempt to resolve the pending charge, in January 2003, Respondent's attorney gave the Union and the Region a written summary of the information it obtained during the investigation of Huerta's and Taylor's allegations. Respondent did not provide information regarding "what, if any disciplinary action was taken with respect to its supervisors, and what evidence it relied upon in reaching its determination." Further, Respondent provided the names of some but not all of the names of the 20 persons allegedly interviewed during the investigation.

The grievances filed on behalf of Taylor and Huerta are still pending. The Union has not yet decided whether to take these grievances to arbitration. Willis testified that under the collective-bargaining agreement there are no time limits which bar the Union from taking these grievances to arbitration.

B. Discussion and Findings

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of its employees, subject to the bargaining unit provisions of Section 9(a). The duty to bargain in good faith requires an employer to furnish information requested and needed by the employees' bargaining representative for the proper performance of its duties to represent unit employees of that employer. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). A union's request for information regarding the terms and conditions of employment of the employees employed within the bargaining unit represented by the union, is "presumptively relevant" to the Union's proper performance of its collective-bargaining duties, *Samaritan Medical Center*, 319 NLRB 392, 397 (1995), because such information is at the "core of the employee-employer relationship," *Graphics Communications Local 13 v. NLRB*, 598 F.2d 267, 271 fn. 5 (D.C. Cir. 1959), and thus it is relevant by its "very nature." *Emeryville Research Center v. NLRB*, 441 F.2d 880, 887 (9th Cir. 1971).

Therefore, an employer's statutory obligation to provide information presupposes that the information is relevant and necessary to a union's bargaining obligation vis-à-vis its representation of unit employees of that employer. *White-Westinghouse Corp.*, 259 NLRB 220 fn. 1 (1981). Whether the requested information is relevant and sufficiently important or needed to invoke this statutory obligation is determined on a case-by-case basis. Id.

In making this determination of relevance, the Board has followed the following principles:

> Wage and related information pertaining to employees in the bargaining unit is presumptively relevant, for, as such data concerns the core of the employer-employee relationship, a union is not required to show the precise relevance of it, unless effective employer rebuttal comes forth; as to other requested data, however, such as employer profits and production figures, a union must, by reference to the circumstances of the case, as an initial matter, demonstrate more precisely the relevance of the data it desires.

Curtiss-Wright Corp. v. NLRB, 347 F.2d 61, 69 (3d Cir. 1965), cited with approval in *Coca-Cola Bottling Co.*, 311 NLRB 424, 425 (1993).

> Thus, if the requested information goes to the core of the employer-employee relationship, and the employer refuses to provide that requested information, the employer has the burden to prove either lack of relevance or to provide adequate reasons why it cannot, in good faith, supply the information. If the information requested is shown to be irrelevant to any legitimate union collective-bargaining need, however, a refusal to furnish it is not an unfair labor practice.

Coca-Cola Bottling Co., 311 NLRB at 425 (citing *Emeryville Research Center v. NLRB*, 441 F.2d 880 (9th Cir. 1971)).

The standard to determine a union's right to information will be "a broad discovery type standard," which permits the union access to a broad scope of information potentially useful for the purpose of effectuating the bargaining process. *NLRB v. Acme Industrial*, 385 U.S. at 437 fn. 6; see also *Anthony Motor Co.,* 314 NLRB 443, 449 (1994). There only needs to be "the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Acme Industrial*, 385 U.S. at 437. Although information pertaining to unit employees is generally considered presumptively relevant, with respect to nonunit personnel, however, "the burden is upon the union . . . to establish relevance without the benefit of any presumption." *E.I. DuPont & Co. v. NLRB*, 744 F.2d 536, 538 (6th Cir. 1984). In order to establish relevancy of information pertaining to nonunit employees, the requested information must be relevant to the union's statutory duty and obligations. *Safeway Stores*, 240 NLRB 836, 837–838 (1979). In other words, it must be "related to the Union's function as bargaining representative and reasonably necessary to performance of that function." *Curtiss-Wright Corp. v. NLRB,* 347 F.2d 61, 68 (3d Cir. 1965).

In *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1104–1105 (1991), the Board stated:

> In general, the Board and the courts have held that information that aids the arbitral process is relevant and should be provided. In this regard, the relevancy of information and the concomitant duty to furnish it are not affected by whether the request for information is made at the grievance stage or after the parties have agreed to arbitration. This is so because the goal of the process of exchanging information is to encourage resolution of disputes, short of arbitration hearings, briefs, and decision so that the arbitration system is not "woefully overburdened." Moreover, information of "probable relevance" is not rendered irrelevant by an employer's claims that it will neither raise a certain defense nor make certain factual contentions, because "a union has the right and the responsibility to frame the issues and advance whatever contentions it believes may lead to the successful resolution of a grievance." Further, because the Board, in passing on an information request, is not concerned with the merits of the grievance, it is also not "willing to speculate regarding what defense or defenses an employer will raise in an arbitration proceeding." [Citations omitted.]

With respect to internal investigations, such as involved in the instant case, the Board requires an employer to disclose the names of the individuals whom it interviewed. *Boyertown Packaging Corp*., 303 NLRB 441, 444 (1991). However, an employer has no obligation to furnish the statements of employee witnesses. *Anheuser-Busch, Inc.,* 237 NLRB 982, 984–985 (1978); *Manchester Health Center*, 287 NLRB 328 (1987). Likewise, there is no requirement to furnish summaries of witness statements. *Boyertown Packaging,* supra at 444. Moreover, the Board has held that an employer is not required to give opinions, comments or recommendations of those who conducted the investigation. *Postal Service*, 305 NLRB 997, 1007 (1991).

In *Postal Service*, 301 NLRB 709 (1991), cited by the General Counsel, the respondent-employer terminated a bargaining unit employee for falsifying an employment application. The charging party-union requested disciplinary records regarding three supervisors who had been disciplined for falsifying postal service documents. The Board held that the supervisors' disciplinary information was relevant to determine whether a unit employee was given harsher treatment and thereby disparately treated. See also *Postal Service*, 289 NLRB 942 (1988) (discipline records of supervisors allegedly engaged in same activity held relevant to grievance of discharged employee).

Respondent seeks to distinguish *Postal Service*, 301 NLRB 709 (1991), and *Postal Service*, 289 NLRB 942 (1988), on the ground that those cases held that disciplinary records of supervisors were relevant only to the issue of disparate treatment of employees with regard to discipline. Here, the Union seeks information regarding the discipline of supervisors in order to argue that the supervisors committed wrongs against the grievants and/or that the supervisors were not adequately disciplined. The adequacy of the discipline of the supervisors does not appear to be relevant to the Union's performance as bargaining representative. The issue is whether the information regarding the discipline of supervisors, if any, is relevant to the question of whether Respondent discriminated against the employees represented by the Union, Taylor and Huerta.

It appears Respondent has no obligation under the Act to furnish the statements of employees or supervisors, even if they exist. Likewise, Respondent is not required to furnish summaries of witness statements or give the opinions, comments or recommendations of the managers who conducted the investigation. Thus, it appears the Board would not require Respondent to explain to the Union its basis for its managerial actions regarding the discipline, or lack thereof, of supervisory employees. Under these circumstances, an order that Respondent inform the Union of its interactions with its supervisors seems empty and irrelevant. Information as to whether Respondent gave training, reprimands or even transfers to the supervisors does not establish evidence of wrongdoing. I believe requiring an employer to furnish the Union with such information would be poor public policy because it would have a tendency to discourage employers from taking preventive or corrective action. Accordingly, I shall recommend that the Board issue no remedial order in this case.

Further, in this case, the Union's requests for information appear similar to requests for pretrial discovery. The Board has held that Section 8(a)(5) is not to be used as a device to secure pretrial discovery in arbitration proceedings. See *California Nurses Assn. (Alta Bates Medical Center)*, 326 NLRB 1362 (1998); *Toll & Die Maker's Lodge 78 (Square D Co.)*, 224 NLRB 112 (1976); *Cook Paint & Varnish Co.,* 246 NLRB 646 (1979), enfd. denied on other grounds 648 F.2d 712 (D.C. 1981).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of the Section 2(5) of the Act.

3. The General Counsel has failed to establish that Respondent has violated Section 8(a)(1) and (5) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

[2] All motions inconsistent with this recommended Order are denied. In the event that no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and rec-

ORDER

ommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

The complaint shall be dismissed.
Dated: October 27, 2003